LOW SWEE SIONG

v.

TAN SIEW SIEW

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM JC
[DIVORCE PETITION NO: S8-33-286-2006]
1 OCTOBER 2010

CIVIL PROCEDURE: *Contempt of court - Breach of court order - Access to child - Petitioner husband failing to comply with court orders repeatedly despite being given chances - Petitioner husband's conduct throughout proceedings - Whether in blatant disregard to the law - Explanations given to purge contempt - Whether satisfactory*

CIVIL PROCEDURE: *Contempt of court - Penalty - Penalty imposed on petitioner husband for breach of court order granting child custody to wife - Whether an indefinite penalty - Whether reviewable*

FAMILY LAW: *Children - Application to bring child out of jurisdiction - Whether application genuine by petitioner wife - Grounds of opposition by petitioner husband - Whether motivated by child's welfare or selfish reasons - Evaluation of psychologist - Effect of*

FAMILY LAW: *Custody - Care and control - Petitioner husband granted ex parte custody and control of child - Misrepresenting facts to court - Defied order to hand over child to wife - Whether application inter partes for order allowed - Whether best interests of child to be taken into consideration*

The petitioner husband and petitioner wife were divorced by consent in 2006 and custody of the child was given to the petitioner husband with reasonable access to the petitioner wife ('High Court order dated 19 June 2006'). In 2008, the petitioner wife applied for a variation of the High Court order dated 19 June 2006 and custody of the child was given to the petitioner wife ('High Court order dated 6 August 2008'). The petitioner husband appealed against the High Court order dated 6 August 2008 but subsequently withdrew his appeal on the day the appeal was to be heard, *ie,* on 27 July 2010. The Court of Appeal thus reaffirmed the High Court order dated 6 August 2008 and ordered the petitioner husband to hand over the child to the petitioner wife and fixed 12 August 2010 for such handing over. The

petitioner husband then filed an *ex parte* application in encl. 113, seeking access to the child on terms until the matter was heard *inter partes* and that the child be brought for an interview before the court. Enclosure 113 was allowed by the court on 16 August 2010 ('High Court Interim Order dated 16 August 2010'). The petitioner wife then filed an *ex parte* application in encl. 119 to set aside or stay the High Court Interim Order dated 16 August 2010. The court allowed encl. 119 and stayed the High Court Interim Order dated 16 August 2010 until determination of the *inter partes* hearing by the petitioner wife. That apart, the petitioner wife also filed an application in encl. 110 to be given permission to take the child out of the jurisdiction of this court, and an *ex parte* application in encl. 122 that the petitioner husband hand over the child's passport to her and that his access to the child be suspended in the interim period to commence only during the child's school summer holidays. Enclosures 110, 113, 119 and 122 came up for hearing *inter partes* in chambers before the court on 9 September 2010. Then on 13 September 2010, the court heard contempt of court proceedings against the petitioner husband.

Held (petitioner husband held in contempt of court):

(1) Notwithstanding the petitioner husband's strong attachment to the child, the fact remained that the petitioner wife was given custody of the child *vide* the High Court Order dated 6 August 2008 which was reaffirmed by the Court of Appeal. The petitioner husband by his action of withdrawing his appeal in relation to the High Court Order of 6 August 2008, had closed the door to himself obtaining a final order for the custody of the child. (paras 43 & 44)

(2) When the petitioner husband handed over the child to the petitioner wife on 12 August 2010 at the Court of Appeal the petitioner husband could not keep the child in his custody without any court order allowing the same. Therefore by taking the child away from the petitioner wife on 4 September 2010 and by continuing to keep the child until 9 September 2010, the petitioner husband was in contempt of court for not complying with the relevant court orders. He was also in breach of r. 76(4)(a) of the Divorce and Matrimonial Proceedings Rules 1980 ('DMP Rules'). Thus, he was not entitled to be heard by the court. (paras 46, 52, 54 & 81-82)

(3) The petitioner wife's application to take the child out of the jurisdiction in encl. 110, was a genuine and realistic application and she had made good care arrangements for the child in the UK. The petitioner husband's opposition seemed to be motivated by his own selfish need to cling on to the child when he himself was unable to care for the child, as all this while, the child had been left in the care of his sister and her husband. The observation of the psychologist also showed that the child was not in a stable and loving environment whilst she was with her father. The petitioner husband was not a good role model for the child. He also misrepresented to and misled the court in his *ex parte* application for child access on 16 August 2010. The application in encl. 110 by the petitioner wife was a natural and logical progression of the High Court Order dated 6 August 2008 and the Court of Appeal orders dated 27 July 2010 and 12 August 2010 respectively. Thus encl. 110 should be allowed. (paras 79, 80, 84, 89 & 91-94)

(4) With the granting of encl. 110, the petitioner husband was also granted access to the child on terms stipulated therein. With time, if the petitioner husband proved to be trustworthy and reliable regarding access to the child, such access could later be varied. (paras 95 & 96)

(5) Enclosure 113 had no merit as the petitioner husband obtained the High Court Order dated 16 August 2010 by misrepresenting facts to the court. The prayer for custody of the child was not appropriate in view of the Court of Appeal having just reaffirmed the High Court Order dated 6 August 2008. If allowed, it basically reopened the whole matter and challenged the finality and binding effect of the final court order. The petitioner husband should for the time being leave the child alone with the mother. Hence, encl. 113 should be dismissed. (paras 97-100)

(6) With regards to encl. 119, the High Court Interim Order dated 16 August 2010 would be set aside and the costs of this application would be borne by the petitioner husband in view of the mischief caused by him in filing encl. 113. The petitioner wife would not have filed encl. 119 if the petitioner husband had not filed encl. 113 in the first place. (paras 102-104)

(7) With regards to encl. 122, prayer (a) would be allowed as since encl. 110 had been allowed and the petitioner wife had been given permission to take the child out of the jurisdiction, she would require the child's passport for travelling and immigration purposes. Prayer (b) would also be allowed as since the child would be in the UK, access to her for the time being could not be carried out by the petitioner husband until her next school holidays. (paras 106-107)

(8) The ruling made when the four enclosures were heard in chambers on 9 September 2010 was that the petitioner husband was in contempt of court for taking the child away on 4 September 2010 and then retaining the child until 9 September 2010. Therefore, he could not be heard in respect of the four enclosures and so ordered to hand the child and passport over. However, he failed to so despite three opportunities being given to him. He was found to be insincere and had no intention of handing over the child or the passport to the petitioner wife. His explanation too was not to be believed. He took the law into his own hands by taking the child away on 4 September 2010 in blatant disregard of the relevant court orders. He had shown that he would continue to keep the child with him regardless of the law. He did not show any contrition or remorse over what he had done and did not tender an apology to the court. In the circumstances, he did not purge his contempt to the satisfaction of the court.

(9) The petitioner husband was in contempt of court and fined RM20,000 in default two month's imprisonment and for every day that he continued not to hand over the child and passport, he would be fined an additional RM400 a day until he complied with the same. The additional fine of RM400 per day was not an indefinite open-ended penalty. At any time upon application by the petitioner wife or at the court's own instance, the petitioner husband could be called upon to pay all outstanding fees. The punishment of the additional fine of RM400 could be substituted with an immediate and deterrent custodial sentence.

[Oral application for stay of punishment dismissed].

Case(s) referred to:
Ansah v. Ansah [1977] 2 All ER 638 ***(refd)***
Dr Soo Fook Mun v. Foo Fio Na & Anor And Another Appeal [2001] 2 CLJ 457 CA ***(refd)***
Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***
In Re A v. A (Child: Removal from Jurisdiction) [1979] 1 FLR 380 ***(refd)***
Legasri Purana Chandran v. Sreepathy Ganapathy Krishnan Iyer [2010] 8 CLJ 208 HC ***(refd)***
Nash v. Nash [1973] 2 All ER 704 ***(refd)***
Payne v. Payne [2001] EWCA Civ 166 ***(refd)***
Poel v. Poel [1970] 1 WLR 1469 CA ***(refd)***
Tan Poey Kheng v. Ma Peng Kiat [1983] 1 LNS 56 HC ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] 1 LNS 138 FC ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 76(4)(a)
Law Reform (Marriage and Divorce) Act 1976, ss. 88, 89(2)(e), 101
Rules of the High Court 1980, O. 52 r. 1A

For the petitioner wife - Kiran Dhaliwal; M/s YN Foo & Partners
Susamma Thomas (K Bowanes with her); M/s Shariff & Thomas
For the petitioner husband - Ravi Nekoo (Pushpa Ratnam with him); M/s Hakem Arabi & Assocs

Reported by Sharmini Pillai

JUDGMENT

Yeoh Wee Siam JC:

[1] This is my judgment for the six appeals filed on 20 September 2010 by Low Swee Siong, the petitioner husband, in respect of my decisions made:

(a) in chambers on 9 September 2010 regarding the applications in encls. 110, 113, 119 and 122; and

(b) in open court on 13 September 2010 regarding:

(i) the contempt of court proceedings where the petitioner husband was fined RM20,000, and in default two months' imprisonment, and an additional fine of RM400 for every day that the petitioner husband fails to hand over the child of the marriage, Low Bi-Anne, aged ten years (as on

A 13 September 2010) (Birth Certificate No. 990930-14-6248) ("the child"), to Tan Siew Siew, the petitioner wife (who is now the ex-wife of the petitioner husband) and mother of the child, pursuant to the orders made by me on 9 September 2010 and 13 September 2010, consistent
B with the order of the High Court dated 6 August 2008, which order was reaffirmed by the Court of Appeal on 27 July 2010 and ordered to be executed on 12 August 2010; and

C (ii) my dismissal of the oral application of the petitioner husband for stay of execution of my above order in (a) pending an appeal to the Court of Appeal.

The Four Applications In Encls 110, 113, 119 And 122

D *Enclosure 110*

[2] This is an application filed by Summons in Chambers ("SIC") by the petitioner wife for the following prayers:

E (a) leave to make this application;

(b) the petitioner wife be given permission to take the child, Low Bi-Anne, out of the jurisdiction of this court;

(c) costs in the cause; and

F (d) such other relief as the court thinks just.

Enclosure 113

[3] This is an *ex parte* application filed by SIC by the petitioner
G husband, on a certificate of urgency, for the following prayers:

(a) access to the child be given to the petitioner husband forthwith;

(b) the right of custody, care and control (cumulatively to be
H referred to as "custody") of the child until the final decision of the court after the child has been referred to the Welfare Officer, Department of Social Welfare ("JKM"), for a complete investigation report regarding the suitability for the child's custody;

I (c) the right of access and visitation to be given to the petitioner wife which must be subject to the agreement of the child, without force or pressure upon the child;

(d) costs to be borne by the petitioner wife; and

(e) such other relief as the court thinks just.

Enclosure 119

[4] This is an *ex parte* application filed by SIC by the petitioner wife, on a certificate of urgency, for the following prayers:

(a) the *ex parte* order dated 16 August 2010 be set aside, or stayed;

(b) costs, on a solicitor-client basis, to be paid immediately and in whatever circumstances by the petitioner husband to the petitioner wife; and

(c) such other further relief as the court thinks just.

Enclosure 122

[5] This is an *inter partes* application filed by SIC by the petitioner wife for the following prayers:

(a) the petitioner husband hands over any passport (including any expired passport) of the female child, Low Bi-Anne, forthwith to the petitioner wife;

(b) access to the child be suspended in the meantime and will only commence during the Child's school summer holidays in 2011.

Affidavits

[6] The following Affidavits have been filed by the parties:

(a) Affidavit affirmed by Tan Siew Siew on 13 August 2010 (encl. 111);

(b) Affidavit affirmed by Low Swee Siong on 16 August 2010 (encl. 114);

(c) Affidavit affirmed by Tan Siew Siew on 17 August 2010 (encl. 120);

(d) Affidavit affirmed by Tan Siew Siew on 18 August 2010 (encl. 123);

(e) Affidavit affirmed by Tan Siew Siew on 25 August 2010 (encl. 129);

A (f) Affidavit affirmed by Low Swee Siong on 25 August 2010 (encl. 132);

(g) Affidavit affirmed by Low Swee Siong on 2 September 2010 (encl. 135);

B (h) Affidavit affirmed by Tan Siew Siew on 6 September 2010 (encl. 137);

(i) Affidavit affirmed by Low Swee Siong on 6 September 2010 (encl. 139).

C

Background Facts

[7] The petitioner husband and petitioner wife were married in 1999 ("both parties").

D **[8]** On 19 June 2006 both parties were divorced by consent. The court, in the *decree nisi* dated 19 June 2006 ("the High Court order dated 19 June 2006") gave the right of custody of the child to the petitioner husband/father, with reasonable access to the petitioner wife/mother.

E

[9] On 6 August 2008, the petitioner wife's application for variation of the High Court order dated 19 June 2006 was allowed and the right of custody of the child was given to the petitioner wife ("the High Court order dated 6 August 2008").

F **[10]** The petitioner husband appealed against the High Court order dated 6 August 2008.

[11] The appeal was fixed for hearing in the Court of Appeal on 27 July 2010. On that day, the petitioner husband withdrew G his appeal. The Court of Appeal then reaffirmed the High Court order dated 6 August 2008, and ordered that the petitioner husband hands over the child to the petitioner wife, and fixed 12 August 2010 for such handing over.

H **[12]** On 12 August 2010 the Court of Appeal ordered that the child be handed over to the petitioner wife, and that the petitioner husband provides the petitioner wife with the child's birth certificate and school records within seven days of the order ie, by 19 August 2010.

I

Hearing Of *Ex Parte* Application In encl. 113 On 16 August 2010

[13] On 16 August 2010 I heard the petitioner husband's *ex parte* application in encl. 113 in chambers. Ms KL Chang, counsel acting for Messrs Patrick Fam & Co, and Mr Patrick Fam together with her, in support of the petitioner husband's application, submitted that they believed that on 12 August 2010 the child was taken away from the premises of the Court of Appeal by force. She stated that suddenly the child was taken out through the back door and then disappeared. The police had advised that they should get a court order to give the petitioner husband immediate access to the child at the address given by the Court of Appeal.

[14] Ms KL Chang further submitted that the petitioner husband is worried that the child be taken to the United Kingdom ("the UK") since the petitioner wife is working there. She also informed the court that the petitioner husband went to the petitioner wife's address at USJ Heights and was informed by the guardhouse that the owners of that address, ie, the brother of the petitioner wife, were looking for the child. It was believed that the child had run away. The petitioner husband needed a court order to go to the same address to search for the child.

[15] At the same time, Ms KL Chang applied for the petitioner husband be given access to the child twice monthly from Saturday at 9am to Sunday at 7pm. As for the other prayers in encl. 113, Ms KL Chang requested that they be heard *inter partes*, and she undertook to serve the application on the petitioner wife.

[16] My paramount consideration is the welfare and best interests of the child. If it is true, as alleged by the petitioner husband, that the child was taken away from the Court of Appeal by force, and later ran away from the address of the petitioner wife at USJ Heights, then the child must be immediately found and her safety guaranteed. I was also of the opinion that I should see the child to make sure that she is safe and alright, and to interview the child to determine her state of mind and find out her wishes regarding her custody. This is consistent with the principles and practice governing the court's power to make any order on custody under s. 88 of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA").

[17] I therefore granted the petitioner husband the following interim order:

(a) that access to the child be given to the petitioner husband forthwith in order to ensure that the child is in a safe condition;

(b) thereafter, that the petitioner husband be given access to the child on every alternate Saturday from 9am to Sunday at 7pm until the application is heard *inter partes* on 26 August 2010; and

(c) that the child be brought by the petitioner wife for an interview by the court ("the High Court interim order dated 16 August 2010").

Hearing Of *Ex Parte* Application In encl. 119 On 18 August 2010

[18] Two days later, on 18 August 2010, I heard the petitioner wife's *ex parte* application (encl. 119) to set aside, or to stay the High Court interim order dated 16 August 2010.

[19] Ms YN Foo, acting as counsel for Messrs Shariff & Thomas for the petitioner wife, submitted that the full facts were not given to the court when the petitioner husband moved the court to grant the High Court interim order dated 16 August 2010. She then informed the court of the full facts which are as follows:

[20] The High Court order dated 6 August 2008 varied the *decree nisi* dated 19 June 2006 and custody of the child was given to the petitioner wife. The court also ordered that the child be handed forthwith by the petitioner husband to the petitioner wife. From the facts set out in the affidavit of the petitioner wife in support of encl. 119, the petitioner husband, in the last two years, had stubbornly, wilfully and contumaciously been in contempt of that order, right up to the date the matter was before the Court of Appeal on 12 August 2010.

[21] The petitioner husband had applied for stay of the High Court order dated 6 August 2008. However, the High Court dismissed the application for stay on 21 October 2009. Despite not getting an order for stay, the petitioner husband did not comply with the High Court order dated 6 August 2008 and never handed over the child to the petitioner wife for custody.

[22] Committal proceedings were filed against the petitioner husband but the matter was never determined. A

[23] At the Court of Appeal on 27 July 2010, the petitioner husband withdrew his appeal regarding the High Court order dated 6 August 2008, and no reasons were given for it. B

[24] It was under those circumstances that the Court of Appeal reaffirmed the High Court order dated 6 August 2008, making it a final order. In making such order, the Court of Appeal stated that the interest of the child is paramount, and it is in the interest of the child that the High Court order dated 6 August 2008 be complied with without further delay (see Court of Appeal order dated 27 July 2010). C

[25] The judgment of Hinshawati binti Shariff J regarding the High Court order dated 6 August 2008 took into account the need for the mother to be given a chance to bond with her child since she was deprived of such opportunity for two years. The Court of Appeal took cognizance of that, and told the child to give her mother a chance. This was also reported in most of the local newspapers. D E

[26] Contrary to what was informed to the court by learned counsel for the petitioner husband, the child was at the mother's address at No. 33, Jalan 2/1C, USJ Heights, and the child was there and never ran away. As for the petitioner husband's allegation that the child was taken by force from the Court of Appeal, it is not true. In actual fact what happened was that the Court of Appeal gave both mother and child some private moments to bond with each other, after which they were quietly ushered out by the court staff. F G

[27] The petitioner wife exhibited some photographs taken after the Court of Appeal case ie, on 14 August 2010 where the child was at home with her mother and playing with make-up, and on 17 August 2010 where both mother and child were bonding well, and the child looked happy and relaxed. H

[28] Ms YN Foo urged the court to suspend access to the child by the petitioner husband and to allow the mother to continue bonding with the child, because once the petitioner husband is given access there will be no return of this child to the mother. I

[29] Ms YN Foo also submitted that it is now too early for the court to interview the child since all the time the child was taken care of by her aunt ie, the petitioner husband's sister. In all probability, the child, if interviewed by the court at this juncture, would choose to live with her aunt or father.

[30] Ms YN Foo further informed the court that the petitioner husband's solicitors had been harassing the petitioner wife everyday by bringing the police, and unless the High Court interim order dated 16 August 2010 is set aside or stayed, that harassing will continue.

[31] After being appraised of the above full facts of the matter, and upon being satisfied that the child did not run away, but instead is safe and sound, and bonding well and happily with her mother, I decided that the petitioner wife should be given the necessary time and privacy to continue to bond with and win over the child that she had been deprived of for the past two years. I also considered the fact that an interview at this point in time may not be useful since the child is still very much under the influence and control of the petitioner husband, and also of the child's aunt and uncle who had been taking care of her for the past few years. The child had openly shown her strong inclination towards her father when the Court of Appeal advised her to give her mother a chance. She informed the Court of Appeal that her mother took care of her for only nine months but her father took care of her for ten years.

[32] The petitioner wife contended that the child's mind had been poisoned against her by the petitioner husband. I also bore in mind the real possibility that this child may be suffering from the Parental Alienation Syndrome ("PAS") which some children develop if they are living away from the other parent and are badly influenced by the persons who take care of them on a daily basis.

[33] For the above reasons, I allowed the application in encl. 119 by ordering that the High Court interim order dated 16 August 2010 be stayed until the *inter partes* hearing of the matter, and costs to be borne by the petitioner wife.

Inter Partes Hearing Of The Applications In encls. 110, 113, 119 And 122 On 9 September 2010

[34] The above four encls. were fixed for hearing before me in chambers on the morning of 9 September 2010.

[35] At the outset of the hearing, Ms Kiran Dhaliwal ("Ms Kiran") of Messrs YN Foo & Partners, as counsel for Messrs Shariff and Thomas for the petitioner wife, raised a preliminary objection to the effect that the petitioner husband is in contempt of court, for snatching the child from the petitioner wife on 4 September 2010 (after following them to a restaurant), and that until he purges his contempt, he cannot be heard, and therefore his affidavits filed cannot be considered by the court in respect of the above applications.

[36] Ms Kiran submitted that the petitioner husband's affidavit (encl. 139) cannot be believed as it was filed on 7 September 2010 after she had raised the preliminary objection with his counsel. Ms Kiran then went on to submit that even though the petitioner husband stated in his affidavit that he is not in contempt of court for whatever happened on 4 September 2010, the truth is that the petitioner husband went to the restaurant to ambush the child who was with her mother. He was accompanied by five or six men, who were big built and aggressive, and who had cameras, videos and walkie-talkies, all creating a very intimatory and frightening situation for the child. The petitioner wife averred that she had long suspected that the petitioner husband was involved with gangsters and "Ah Longs" and the events of 4 September 2010 confirmed her suspicions. Photograph LSS-1 at p. 3 of encl. 139 shows the petitioner husband having a walkie-talkie (see petitioner wife's affidavit in encl. 137).

[37] The petitioner husband gave cues to the child on what to do at the restaurant, how to behave, and egged her on until she was forced to follow the father. Photograph LSS-1 in encl. 139 shows the child sitting with her mother. In the other photographs exhibited in encl. 139, the child is shown, seated and crying, clearly very upset by the situation caused by the father.

[38] Ms Kiran then referred to the photographs and CCTV footage submitted by the petitioner wife in encl. 137 eg, TSS-4 which clearly shows that the child was not a prisoner, but had in fact been bonding with the mother. Ms Kiran contended that in fact the petitioner husband had acknowledged in para. 45 of encl. 139 that the photographs exhibited by the petitioner wife are candid and not posed; the child is seen laughing as she plays piggy-back with her mother.

[39] Ms Kiran therefore submitted that the petitioner husband, in complete disregard of the court orders, and the welfare and interest of the child, took the law into his own hands and created the situation on 4 September 2010. She urged the court, acting in the welfare of the child and as *parens patriae* to send a clear message to this recalcitrant and manipulative father. Ms. Kiran also applied for the court to order the immediate return of the child and the child's passport ("the passport"), and for leave for the petitioner wife to take the child to the UK.

[40] In reply to Ms Kiran's Preliminary Objection, Ms KL Chang referred to all the 23 photographs exhibited in encl. 139. She submitted that in most of these photographs, the child is seen being held tightly by the mother, whereas most of the time the child was clutching onto the father. The child was crying at all times. Photograph 10 shows the arrival of the child's aunt, and the mother immediately protecting the child from any contact with the aunt. Photograph 11 shows the child pushing the mother away. Photograph 12 shows the child trying to reach out to her aunt, and her mother trying to push her hand away. Ms KL Chang submitted that in photograph 13, the child informed her aunt that she tried to run away two or three times (see affidavit of the father) and these words were from the video taken by one of the father's friends. The petitioner husband averred that only two friends came with him to the restaurant, and not four or five gangsters as alleged by the petitioner wife. I note that the video clipping was not exhibited by the petitioner husband. Neither did he give the identity of his friend. I am therefore doubtful as to the truth of such averment by the petitioner husband.

[41] From all the photographs exhibited by both parties, I form the opinion that if the child is left with the petitioner wife eg, in the comfort of the home or on vacation with the mother, she is responding very well to the mother eg, happily playing with make-up, riding piggy-back, and posing for her photographs to be taken. However, when the petitioner husband came upon her and her mother, with the great physical tussle for her by both her father and mother, and later by her aunt who had brought her up, the child was extremely confused and traumatised and cried in agony. According to the petitioner wife, the petitioner husband called the reporters to the Police station, and there were about seven reporters and camera men waiting there. Finally, the child left the Police station, walking in front of her father, with her father holding her from behind and walking after her.

[42] I do not think that the photographs show a total rejection of the mother by the child. It shows her confusion and suffering in the midst of the struggle. The child cannot be blamed if she tends to show more inclination towards her father. This is because the child is still in the early stages of bonding with her mother after being physically away from her mother's custody, care and control, not just from 6 August 2008, but even from as early as the date of divorce on 19 June 2006 when she was only six years old.

[43] After considering the submissions of both learned counsels, I held that the father is in contempt of the High Court order of 6 August 2008 which was reaffirmed by the Court of Appeal on 27 July 2010 and 12 August 2010. After the child was handed over by the Court of Appeal on 12 August 2010 to the petitioner wife, the petitioner husband, to be fair to the petitioner wife and the child, should have just left the child alone for the time being. It is highly improbable, as he had contended, that he happened to pass by the restaurant and saw the child there with the mother. The walkie-talkies worn or carried by the petitioner husband and his so-called friends, whether there are two, or five or six of them, are very telling; they show that they had plans to act in concert and would be communicating with each other in carrying out the petitioner husband's plan to take away the child from the petitioner mother.

[44] Notwithstanding the petitioner husband's strong attachment to the child, the fact remains that it is the petitioner wife who is now given custody of the child *vide* the High Court order dated 6 August 2008 and the Court of Appeal Orders dated 27 July 2010 and 12 August 2010. The petitioner husband, for reasons of his own, chose to withdraw his appeal regarding the High Court order of 6 August 2008. As such, he had closed the doors to himself for obtaining a final order for custody of the child.

[45] After the petitioner husband had handed over the child to the petitioner wife on 12 August 2010 at the Court of Appeal, the petitioner husband cannot keep the child in his custody without any court order allowing the same. Therefore, by taking the child away from the petitioner wife on 4 September 2010, and continuing to keep the child, even until 9 September 2010, it tantamounts to contempt of court for not complying with the relevant court orders.

[46] It is well-settled law that a person who is in contempt of court cannot be heard by the court until he has purged his contempt.

[47] In the Supreme Court case of *Wee Choo Keong v. MBf Holdings Bhd. & Anor And Another Appeal* [1993] 3 CLJ 210, His Lordship Abdul Hamid Omar stated:

> It is established law that a person against whom an order of Court has been issued is bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.
>
> It has not been seriously disputed, and indeed we find that it is also an established general rule of law that a person in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt.

[48] Further, His Lordship stated:

> We are unable to accept any exceptions *per se* to the general rule that a party in contempt cannot be heard until he has purged his contempt ...
>
> Orders of Court must be treated with respect and require strict obedience.

[49] The Supreme Court in the above case had referred to *Hadkinson v. Hadkinson* [1952] 2 All ER 567 which case had set out the general rule. The Supreme Court in *Wee Choo Keong (supra)* had approved and was in favour of the views of Denning LJ expressed in *Hadkinson (supra)*:

> that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt ...
>
> Orders of Court must be treated with respect and require strict obedience ... Although the right to be heard is a fundamental right vested in all litigants, where the litigant shows himself to have little or no regard to an order issued against him, then he has to a certain extent forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

[50] There is also the modern rule laid down by Denning LJ (at p. 293), which approach was approved in *Wee Choo Keong (supra)*:

> Those cases seem to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step in which a court will only take when the contempt itself impedes the course of justice and there is no effective means of securing his compliance. ...
>
> ... Applying this principle I am of the opinion that the fact that a party has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.
>
> The present case is a good example of a case where the disobedience of the party impedes the course of justice.

[51] In a recent case which I decided, namely *Legasri Purana Chandran v. Sreepathy Ganapathy Krishnan Iyer* [2010] 8 CLJ 208, I had considered extensively and in depth the law regarding whether a party in contempt ought to be heard by the court. I had fully endorsed the modern rule as set out by Lord Denning that where a party's contempt is such that it impedes the course of justice, the party should not be heard until the contempt is purged.

[52] Applying the above cases and principle to the present case, I am fully convinced that the petitioner husband is in gross contempt of court since 4 September 2010, and he has not purged his contempt by returning the child to the petitioner wife from 4 September 2010 to the date of hearing on 9 September 2010.

[53] In addition, r. 76(4)(a) of the Divorce and Matrimonial proceedings Rules 1980 ("the DMP Rules") provides as follows:

> 76(4) On any application to a judge relating to custody, care and control of, or access to, a child:
>
> (a) neither the applicant nor the respondent shall be entitled to be heard in support of or, as the case may be, in opposition to the application unless he is available at the hearing to give oral evidence or unless the judge otherwise directs;.

[54] The petitioner husband was also in breach of r. 76(4)(a) of the DMP Rules. He knew that the above four enclosures were fixed for hearing on 9 September 2010. He was represented by legal counsel but he chose to be absent from court and continued to be in contempt of court by keeping the child with him. In view of this, pursuant to the above r. 76(4)(a), the petitioner husband shall not be entitled to be heard by this court.

[55] On the other hand, the petitioner wife was in court on 9 September 2010 as required by r. 76(4)(a) of the DMP Rules.

[56] Accordingly, I ruled that the petitioner husband should not be allowed to be heard on 9 September 2010. I requested both learned counsels for the petitioner husband to leave the chambers before the court proceeded with the hearing of the above four enclosures. It was then 11.25am. Just before the two learned counsel left the chambers, I also gave the order that the petitioner husband returns the child to the petitioner wife on the same day at 3.30pm failing which a warrant of arrest would be issued against him immediately. Learned counsels for the petitioner husband were directed by the court to contact and inform the petitioner husband of the order to ensure his strict compliance by 3.30pm of 9 September 2010.

[57] Ms Kiran then requested that there should be no reporters when the handing over of the child takes place. In the interest of the child, I therefore ordered that the handing over of the child be done in the court room, in camera, without the presence of reporters, or members of the public. However, I did not issue any gag order to the press as was reported by the press on 10 September 2010.

[58] After the two learned counsels for the petitioner husband had left my chambers, I heard Ms Kiran in respect of the applications in the above four enclosures.

[59] I have carefully considered all the applications, the affidavits, the documents and exhibits, and the submissions, both oral and written, that have been filed, submitted or adduced by both parties. To a large extent I agree with the submissions of learned counsel for the petitioner wife. It would not be necessary for me to restate in detail the contents of the affidavits or submissions here.

[60] I made the following decisions and orders, and I will now briefly state the grounds of my decisions:

Enclosure 110

[61] I allowed prayers (a) and (b). As for prayer (c), I ordered that costs be borne by the petitioner wife.

[62] Enclosure 110 is the petitioner wife's application for leave to take the child out of jurisdiction ie, to the UK where the petitioner wife is now residing and working.

The Law On Taking A Child Out Of Jurisdiction

[63] The statutory provisions governing taking a child out of jurisdiction are found in s. 89 and 101 of the LRA.

[64] Section 89(2)(e) of the LRA states:

> 89(2) Without prejudice to the generality of subsection (1), an order for custody may:
>
> (e) prohibit the person given custody from taking the child out of Malaysia;.

[65] Section 101 of the LRA, *inter alia*, states:

> 101(1) The court may on the application of the father or mother of a child:
>
> (b) where, under any agreement or order of court, one parent has custody of the child to the exclusion of the other,
>
> ... may give leave for such child to be taken out of Malaysia either conditionally or subject to such conditions or such undertaking as the court may think fit.

[66] The question in the present case is whether the petitioner wife should be allowed to take the child to the UK when the father of the child, ie, the petitioner husband, will still continue to reside in Malaysia.

[67] In the Federal Court case of *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138 Raja Azlan Shah FJ (as he then was), in applying English principles taken from cases in the UK, stated:

> In considering questions of custody of children the paramount consideration is the welfare of the children. No parent has a prior right.

[68] In the above relocation case, the High Court, in the balancing exercise, concluded that the children's future and welfare were better served by remaining with the mother and going with her to reside in Australia as opposed to remaining in Malaysia to live with their stepmother.

[69] Lord Justice Thorpe in the Court of Appeal case in *Payne v. Payne* [2001] EWCA Civ 166 made a study of the modern law in the UK regarding applications for the removal of a child out of the jurisdiction. He referred to the case of *Poel v. Poel* [1970] 1 WLR 1469 which he said was the first case on the law regulating applications for the emigration of children. He stated:

> I doubt that the judges deciding the case recognised how influential it would prove to be. Whilst emphasising that the court shall have regard primarily to the welfare of the child, both Sachs LJ and Winn LJ emphasised the importance of recognising and supporting the function of the primary carer. That consideration was most clearly expressed by Sachs LJ when he said (at page 1473):
>
> > When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents must of necessity become one who is in the custody of a single parent. ...
>
> ... The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.

[70] The above was cited with approval by Raja Azlan Shah FJ (as he then was) when he upheld the decision of Arulanandom J in *Teh Eng Kim (supra)*.

[71] Thorpe LJ also referred to a later case of *Nash v. Nash* [1973] 2 All ER 704 where Davies LJ at p. 706G stated:

> But I emphasise once more that when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody.

[72] Thorpe LJ then traced the subsequent development of the approach in deciding relocation cases. He referred to *In Re A v. A (Child: Removal from Jurisdiction)* [1979] 1 FLR 380:

> It is always difficult in these cases when marriages broke up where a wife who, as this one is, is very isolated in this country feels the need to return to her own family and own country ...
>
> ... The fundamental question is what is in the best interest of the child; and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child reasonably well? To that question the only possible answer in this case is Hong Kong. It is true that it means cutting the child off to a large extent - almost wholly perhaps - from the father; but that is one of the risks which have to be run in cases of this kind. If it is wholly unreasonable, as I think it is in this case, to require the mother to remain in England ... then I still think the answer is that where she can best bring up this child is the proper solution to this case.

[73] The principles to be applied have been well summarised by Thorpe LJ:

> A review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions: (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

[74] In the event of any cross-applications by the non-custodial spouse, usually in response to a mother's application to leave the jurisdiction, Thorpe LJ suggested the following approach:

> (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask, is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow.
>
> (b) If, however the application passes these test then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future

A relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationship with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic
B proposal?

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate.
C

In suggesting such a discipline I do not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well being of the primary carer. In any evaluation of the welfare of the child as the
D paramount consideration great weight must be given to this factor.

Present Case

[75] The learned judge in making the High Court order dated 6 August 2008 had made an express finding that it is in the
E welfare and interest of this child that custody be given to the petitioner wife.

[76] The petitioner wife lives and works in the UK. She is a manager of the Good Earth Chinese restaurant in London where
F she has worked since 2003. She has bought a property there and is in a financially better position than the petitioner husband to bring up this child. This was also within the contemplation of the learned judge when she arrived at her decision to grant custody of the child to the petitioner wife.

G **[77]** The same learned judge found that the petitioner wife should be given every opportunity to bond with and care for her child, rather than leaving the child in the care of a "stranger" ie, the paternal aunt and her husband, which was the arrangement if custody of the child remained with the father.
H

[78] From the judgment of the same learned judge, and also the affidavits of the petitioner wife, I find that the child was taught negative things about her mother, and not to love her mother.

I **[79]** The petitioner wife's application to take the child out of Malaysia to the UK is genuine. The petitioner wife is now a permanent resident of the UK, and she is the manager of a restaurant there. Her application is motivated by her desire and

need to return to her home in the UK with her child. I do not think that her application is motivated by some selfish desire to exclude the petitioner husband from the child's life.

[80] The petitioner wife's application is realistic. She has investigated and set up specific proposals for the child to live and attend school in the UK. I do not think that a change of residence or school would be too difficult for the child to adjust herself to. Even here, in Malaysia, this child has had various changes of residence and four changes of school in her five years of education already. I believe the child will have a very good education in the UK. If at all the child is resisting going to the UK, it could be because she does not know what to expect, what life would be for her there, as opposed to her familiar environment and routine here. Given sufficient time and exposure, there is a strong possibility that she will be very happy living with her mother in the UK, and schooling there. If the petitioner husband truly loves this child unselfishly, he should encourage the child to go and try out a new life in the UK.

[81] The petitioner husband's opposition here appears to be motivated, not by a genuine concern for the future of the child's welfare, but by his own selfish need to cling on to the child when he himself is unable to care for the child. All this while, he had left the care of the child entirely to his sister, Low Swee Toh, and her husband, Vincent Wong (a childless couple), to the extent that the child even called the aunt her "Mama".

[82] In the light of the above, since the petitioner husband had, in the past, abandoned the child, and as the petitioner wife has family and property in Malaysia and she visits Malaysia regularly, there is no detriment to the petitioner husband. His future relationship with the child can be arranged for when the child returns for visits to Malaysia with the petitioner wife, or when he is in the UK.

[83] Should this court refuse the petitioner wife's application, the impact on her would be to effectively deprive her of the custody of her child and this would be a real injustice to her. It also cannot be in the welfare and interest of the child since the child has already been entrusted to her custody by the court.

[84] The petitioner wife has good care arrangements for the child in the UK (see encl. 129). She has purchased a house in London where a room has been allocated for the child. Her

working hours are flexible and she is able to arrange her shifts around her daughter's schedule. She has a part-time domestic helper who has been staying with her for 3 1/2 years. The helper will be able to take care of the child while the petitioner wife is at work. The petitioner wife intends to enrol her daughter in Dunraven School at 94-98 Leigham Court Road, Streatham, London SW16 2 QB which is nearby to her house.

[85] I agree with the submission of learned counsel for the petitioner wife that the mother is able to spend time with her child, and care for her, providing her with the love and nurture that a daughter would need from her mother, especially when this daughter is reaching puberty soon.

[86] As for the care arrangements of the petitioner husband, from his own evidence, he has changed his residence at least three times since 2008. He averred that he now lives with the child in an apartment, and the aunt lives on a different floor and only helps him to care for the child. I do not think that this can be believed because, as submitted by learned counsel for the petitioner wife:

- The tenancy agreements for Rhythm Avenue (where the petitioner husband alleges that he now lives) in exh. LSS-2A and LSS-2B (encl. 135), although allegedly commencing from January 2010, were dated and stamped on 24 August 2010 and 25 August 2010 respectively, and annexed to an Affidavit that was only affirmed very recently ie, on 25 August 2010. It is clear to me that this was all done last minute for the purpose of defeating the petitioner wife's applications in this case.

- Further, the petitioner husband's affidavit in support of his application affirmed on 12 May 2010 (encl. 89) has stated his residential address at No. 69, Jalan PJU 10/14J, Saujana Damansara, 47830 Selangor.

[87] The petitioner husband has not provided any evidence of his financial position, or proof of his employment.

[88] The child, while in the care of the petitioner husband, has changed school four times in her five years of school.

[89] The observation of the psychologist in exh. TSS5 in the petitioner wife's affidavit (encl. 137) shows that the child has not had a stable and loving environment.

[90] An excerpt from the overall observations of the said psychologist states:

> Based on the assessments she has been a child that has tried to be pleasing to the adults around her for fear of being rejected or not loved if she does not comply with their directions. This fear could only have come about if she was told or shown rejection if she was not pleasing. As most of her life has been with her aunt and father it is appropriate to assume that the fear and anxiety she is experiencing has come from life with them. Having a stable and consistent life style which her mother has been living and is able to support will be good for Bi-Anne. However if there is a strong influence or time spent with the aunt and father then I'm afraid they would never allow her the opportunity to bond with her mother. This is not in the best interest of the child.

[91] The petitioner husband is not a good role model for the child judging from the manner in which he had blatantly disregarded the court orders and is in contempt of court. He had clearly orchestrated the scene at the restaurant on 4 September 2010 and brought in other men to assist him, and wanted the reporters and camera men to follow him to the Police station. He also misrepresented to, and misled, the court by informing the court that the child ran away from the mother when he made his *ex parte* application for immediate access of the child on 16 August 2010.

[92] It will also be detrimental to the welfare of the child if she is under the continued influence of the petitioner husband who has taught her to hate her mother.

[93] This application by the petitioner wife is a natural and logical progression of the High Court order dated 6 August 2008 and the Court of Appeal orders dated 27 July 2010 and 12 August 2010.

[94] For the above reasons, I therefore ordered accordingly.

[95] However, when I allowed the petitioner wife's application to take the child out of jurisdiction I also granted access to the petitioner husband as follows:

(a) The petitioner wife is under a duty to bring the child back from the UK to Malaysia, at her own expense, every year during the child's school summer holidays, or during the Christmas season, for a period of 1 week. The petitioner husband is granted supervised access to the child at the petitioner wife's residence, or at any other agreed place.

(b) The petitioner husband is allowed to have access to the child in the UK, at his own expense, for not more than four times a year, to a maximum of not more than 1 week each time at any agreed place, and such access is to be supervised.

(c) The petitioner husband is not allowed overnight access of the child.

(d) Access is to be subject to the child's school schedule.

(e) Access each time should not commence earlier than 9am and not exceed 10.30pm.

[96] I am of the opinion that with time, if the petitioner husband proves to be trustworthy and reliable regarding access to the child, such access can later be varied and made more liberal, with no necessity for supervision, so that the child can spend more time with the petitioner husband.

Enclosure 113

[97] I dismissed the petitioner husband's application here with costs.

[98] My reasons for not allowing prayers (1) and (2) are as stated in the above for the hearing of the *ex parte* application in encl. 119 on 18 August 2010. Clearly, the petitioner husband had obtained the High Court order dated 16 August 2010 by misrepresentation of facts to the court ie, that the child had ran away from the petitioner wife's address in USJ Heights. Since the child did not run away, there is no urgency or emergency situation to necessitate an *ex parte* application being filed in the first place (see *Tan Poey Kheng v. Ma Peng Kiat* [1983] 1 LNS 56, applying *Ansah v. Ansah* [1977] 2 All ER 638).

[99] As for prayer (2), I did not allow it because I do not think that it is appropriate at this time, so soon after the Court of Appeal had just reaffirmed on 27 July 2010 and 12 August 2010 the High Court order dated 6 August 2008, for this court to allow the petitioner husband's application for custody of the child. This would be reopening the whole matter, defeating the whole purpose of the court order that has just been given. It is basically challenging the finality and binding effect of a final court order. As I had stated earlier, the husband should leave the child alone for the time being to be with her mother. He should not abuse the whole court process to fight for custody of the child now,

especially when he chose to withdraw his appeal in the Court of Appeal on 27 July 2010, which appeal was intended to challenge the custody of the child being given to the petitioner wife. Clearly, the petitioner husband is no respecter of the court, or the judicial process and court orders.

[100] There is no merit to this application.

Enclosure 119

[101] I gave the following decision:

[102] Prayer 1 is allowed ie, the High Court interim order dated 16 August 2010 was set aside (and not stayed, as was previously ordered by me during the *ex parte* hearing on 18 August 2010).

[103] Prayer 2: The costs of the application, for both *ex parte* and *inter partes* hearing, is to be borne by the petitioner husband.

[104] Costs have to be borne in this manner in view of the mischief caused by the petitioner husband in filing encl. 113. The petitioner wife would not have filed encl. 119 if the petitioner husband had not filed encl. 113 in the first place.

Enclosure 122

[105] I allowed prayers (a) and (b).

[106] I allowed prayer (a) because since the application in encl. 110 is allowed, and the petitioner wife is given permission to take the child out of jurisdiction, the petitioner wife would now require the child's passport for travelling and immigration purposes when she takes the child to the UK, and later back to Malaysia for holidays.

[107] Regarding prayer (b), since the court has allowed the petitioner wife to take the child to the UK, access for the time being by the petitioner husband cannot be carried out until the child's next school summer holidays. Hence prayer (b) is allowed.

Contempt Of Court Proceedings

[108] On 9 September 2010 ie, the eve of Hari Raya, at about 11.25am the court, in chambers, gave an order to the petitioner husband, through his two learned counsels, that he hands over the child and the passport to the petitioner wife at 3.30pm of the same day in the court room.

[109] The court waited until 3.45pm but the petitioner husband did not come to court to comply with the above order. Both learned counsels for the petitioner husband informed the court that they had texted him and also faxed him a letter regarding the above order. However, the petitioner husband did not respond to his two learned counsels.

[110] Ms KL Chang then appealed to the court for more time for the petitioner husband to comply with the court order.

[111] I therefore decided to give the petitioner husband a second opportunity to comply with the court order. I then postponed the matter to 11.30am on 13 September 2010, a Monday, and also the fourth day of Hari Raya.

[112] On 13 September 2010 at 11.30am the petitioner husband was present in court, this time represented by his newly-appointed counsels, namely Mr Ravi Nekoo ("Mr Ravi") and Ms Pushpa Ratnam of Messrs Hakem Arabi & Associates.

[113] Mr Ravi informed the court that he had filed two new applications (encls. 144 and 145) that same morning. Unfortunately, the applications could not be processed yet by the court Registry since it was the festive season and the Deputy Registrar and Senior Assistant Registrar were on leave. Be that as it may, Mr Ravi submitted that committal proceedings cannot be commenced against the petitioner husband since there was no application for leave to commence committal proceedings on 9 September 2010. He stated that unless the court invokes O. 52 r. 1A of the Rules of the High Court 1980 ("the RHC") for contempt committed in the face of the court, the other rules regarding committal for contempt of court in O. 52 of the RHC have to be complied with first. The court has to ensure that the person alleged to be in contempt understands the nature of the offence against him, and he must be given the opportunity to be heard in his own defence. He submitted further that there was no charge framed, and the petitioner husband was never given an opportunity to defend himself. This is a fundamental error and he urged the court to review its earlier decision.

[114] In support of his submissions, Mr Ravi cited *Dr Soo Fook Mun v. Foo Fio Na & Anor And Another Appeal* [2001] 2 CLJ 457 at p. 458:

> [1] The failure of the High Court to hear and determine Dr Soo's application for particulars occasioned a most serious and fundamental miscarriage of justice. It not only deprived him of his basic right to have his application heard but it also deprived him of the substantive and valuable right to appeal against any decision made against him. Further, a perfectly legitimate application by Dr. Soo to amend his defence was dismissed with an unusual order that he paid the costs in any event. Whilst the first reaction of the Court was to order a re-trial before any judge, justice would be better served if the court determined this case on its merits.

[115] With respect to Mr Ravi, I agree with Ms Kiran that the Dr Soo's case is not a case on contempt of court, and it has to be distinguished from this case.

[116] Ms Kiran then submitted along almost the same lines as her earlier preliminary objection made on 9 September 2010, and reiterated the facts regarding the petitioner husband's contempt of court.

[117] At this point, I wish to stress that when I heard the four enclosures in chambers on 9 September 2010, after hearing both learned counsels on Ms Kiran's preliminary objection, I only made the ruling that the petitioner husband is in contempt of court for taking away the child on 4 September 2010 and then retaining the child until 9 September 2010. As such, he could not be heard in respect of the four enclosures. However, at that point, I did not commence committal proceedings against him.

[118] I merely ordered that the petitioner husband hands over the child and the passport at 3.30pm on 9 September 2010. Thus, Mr Ravi was clearly mistaken when he submitted that no charge was framed against the petitioner husband, and that he should be given an opportunity to be heard, and that I should review all my decisions made for the four enclosures on 9 September 2010. Little did Mr Ravi know, since he was just appointed by the petitioner husband, that Ms KL Chang fully represented the petitioner husband on 9 September 2010 and submitted extensively on Ms Kiran's preliminary objection, that the petitioner husband, being a party in contempt of court, should not be heard by the court. There is no merit in Mr Ravi's submissions, and I do not think that I should review all my decisions and orders

A regarding the four enclosures made on 9 September 2010 just because suddenly the petitioner husband decided to come to court on 13 September 2010 at 11.30am, empty-handed, without the child and the passport.

B **[119]** Notwithstanding the above, I then proceeded to give the petitioner husband the fullest opportunity to explain on oath, from the witness' stand, as to why he did not produce the child and the passport.

C **[120]** The petitioner husband explained that his lawyers told him not to attend court on 9 September 2010. That was why he was absent then. As for the child, he stated that the child informed him that she was afraid to come to court because on the last occasion, after she had attended court, she was bundled into a car by seven or eight persons.

D

[121] The petitioner husband stated that he did hand over the child on 12 August 2010 in the Court of Appeal.

[122] The petitioner husband informed the court that on
E 4 September 2010 he went for breakfast in USJ 11 with two friends. When he was about to go into the shop, the child and her mother came out from the shop. The child followed him. There was a tussle between him and the petitioner wife because the child started crying and pulled his hand and shirt. Finally, they
F went to the Police station. The child told the mother to take her hands off from pulling her; she told the mother in a loud tone to go, and then held onto the petitioner husband's hands and went home with him. He also stated that the child informed him that she tried to run away on two occasions when she was with the
G mother from 12 August 2010 to 4 September 2010.

[123] I then explained to the petitioner husband that the High Court order dated 6 August 2008 gave custody of the child to the petitioner wife. The Court of Appeal fixed his appeal for
H hearing on 27 July 2010. However, the petitioner husband chose to withdraw his appeal. In view of that, the Court of Appeal reaffirmed the High Court order dated 6 August 2008. This means that the petitioner husband does not have custody of the child. That is why he had to hand over the child to the petitioner wife
I on 12 August 2010 at the Court of Appeal. Therefore, even if the child cried and wanted to follow the petitioner husband home on 4 September 2010, the petitioner husband cannot keep the child, and since he did so, he is in contempt of court.

[124] Instead of taking action against the petitioner husband for contempt of court, I decided to give him a final opportunity, ie, a third opportunity, to comply with the court order. It was then about 1.05pm. I informed him that he is required to hand over the child and the passport at 3.45pm of the same day. I also informed him and Mr Ravi that if he fails to comply with my order at 3.45pm then the court will take action against him for contempt in the face of the court.

[125] At 3.45pm the petitioner husband came to court. Under oath, he informed me that the child cried and refused to come to court because she was afraid due to the last incident on 12 August 2010. He stated that he told the child not to be afraid and that the judge just wanted to see her but she told him not to force her because she was extremely frightened to come to court. As for the passport, the petitioner husband stated that he was at his home in USJ with the child, trying to persuade her to come to court. As a result, he did not have time to go to his mother's home to collect the passport.

[126] I then gave the petitioner husband the opportunity to show cause as to why he should not be committed to prison or be fined for contempt of court. The petitioner husband gave the same explanation that he tried his best to convince the child and persuade her to come to court but she refused because it means that she cannot see him or his family members.

[127] Mr Ravi asked for leniency from the court since the petitioner husband had tried his best to bring the child to the court. He submitted that the petitioner husband never intended to disobey the court. He also stated that it is unfortunate that the court could not interview the child.

[128] At this juncture, I wish to state that at no time did the petitioner husband try to produce the child before me, so the question of me interviewing the child, if at all that is what learned counsel for the petitioner husband was suggesting, is rendered impossible by the petitioner husband's own acts of contempt of Court.

[129] Ms Kiran then submitted that from the petitioner husband's evidence, he only respected the child's wishes and did nothing to bring the child to court. He created the whole situation and said that the child told him not to force her to come to court, but this

A is all hearsay. As for the passport, Ms Kiran submitted that the order was given on 9 September 2010 but it was already 13 September 2010 that day. He had ample time to get the passport but he chose not to do so.

B **[130]** I was not satisfied with the petitioner husband's explanation to purge his contempt in the face of the court. Clearly, he was proven that, as a father, he is unable to manage or discipline, or exercise the right kind of parental supervision over this child, in order to bring her to court in compliance with the court order. C He also did not make any efforts to bring the passport to court even though he was ordered to do so on 9 September 2010. From 9 September 2010 to 13 September 2010, he had more than enough time to collect the passport from his mother's house (if he is to be believed at all that the passport was there). In any D case, it is rather strange and unbelievable that he should, at this critical time, be conveniently keeping the passport with his mother when she has no legal right to keep it.

[131] I am convinced that the petitioner husband is not sincere E and has no intention to hand over the child or the passport to the petitioner wife. His explanation cannot be believed at all. He took the law into his own hands by taking the child away on 4 September 2010, in blatant disregard of the court orders of 6 August 2008, 27 July 2010 and 12 August 2010. He has shown F that regardless of the law, he would continue to keep the child with him.

[132] The petitioner husband did not show any contrition or remorse over what he had done. He did not even tender an apology to the court.

G

[133] Considering that this is the third time that I had given him the opportunity to comply with the court orders, and since he did not do so, and did not purge his contempt to the satisfaction of the court, I then proceeded to hold that the petitioner husband H is in contempt of court, and fined him RM20,000, in default two months' imprisonment, and for every day that he continues not to hand over the child and/or the passport to the petitioner wife, he would be fined an additional RM400 a day until he complies with the same.

I

[134] The above punishment is just and fair. I could have committed the petitioner husband to prison straightaway but I imposed a fine instead. This is with the hope that he would be

contrite and remorseful over his actions and do his utmost to hand over the child and the passport as soon as possible to the petitioner wife.

[135] Finally, I state here that the additional fine of RM400 per day is by no means intended to be an open-ended penalty indefinitely. At any time, upon application by the petitioner wife, or at the court's own instance, the petitioner husband can be called upon to pay all outstanding fines, and the punishment of the additional fine of RM400 can be substituted with an immediate and deterrent custodial sentence.

[136] I dismissed the oral application made by learned counsel for the petitioner husband for stay of the above punishment. I see no merit or good reason for such application for stay. Clearly, the petitioner husband does not have even one *iota* of respect for the law, or the court and its orders from 6 August 2008. He only allowed the child to go back to the petitioner wife from 12 August 2010 to 4 September 2010. He knows that he is breaching court orders but he does not seem to care. He deserves to be punished adequately for contempt of court. This court cannot allow the petitioner husband to act lawlessly in a civil society where at all times it is imperative that we uphold the rule of law.